No. 21337

In the

United States Court of Appeals

For the Ninth Circuit

TRI VALLEY GROWERS, formerly known as TRI-VALLEY PACKING ASSOCIATION (a corporation),

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Supplemental Brief for Petitioner

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STATEMENT OF JURISDICTION

Petitioner herein is Tri Valley Growers, a corporation, formerly known as Tri-Valley Packing Association.[1]

This supplemental brief is filed on behalf of Petitioner to review and set aside a second Order of Federal Trade Commission issued on *July 28, 1966,* and served on Petitioner on *August 15, 1966* (R. XXIV, 2145-2147).

The second order is based (as is the one that preceded it) upon two complaints filed by the Commission against Petitioner several years ago. The details of these complaints are set forth in

1. This change of name does not in any way affect the matters before the Court for decision.

Petitioner's brief filed with this Court when the matter *first* came before it on Petitioner's *first* petition for review (Brief for Petitioner, Docket No. 18, 125, pp. 2; 7; 25-26).

These complaints, separately charge violations of sections 2(a) and (d) respectively of the Clayton Act, as amended by the Robinson-Patman Act [15 U.S.C. Section 13(a) and (d)].

Petitioner filed its second petition for review on *October 13, 1966,* i.e., within 60 days after the service of the order. Jurisdiction of this Court is expressly provided by Section 11(c) of said Act [15 U.S.C. 21(c)], which authorizes the filing, within sixty (60) days after the service of a Commission order, of a petition to review in the Court of Appeals of any circuit within which the person or corporation against whom the order is issued resides or carries on business.

Petitioner is a farmer-owned and operated, non-profit co-operative corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City and County of San Francisco, and carries on business within said State of California (R. I, 2; R. II, 106; R. VI, 573; 588; R. VII, 628-630).

Accordingly, this Court has jurisdiction to review and set aside said second order.

STATEMENT OF THE CASE

The Commission, with one of its members dissenting, has on two occasions decided that Petitioner violated sections 2(a) and (d) of the Act [15 U.S.C. 13(a) and (d)], and pursuant thereto has issued successively two cease and desist orders in effect enjoining in the broadest terms Petitioner from discriminating in prices and advertising allowances between its competing buyers of its canned goods of like grade and quality (R. VI, 578; XXIV, 2146-2147). The first of these two decisions was on review reversed by this Court and the case was thereupon re-

manded by the Court to the Commission for the resolution of certain issues relevant to both charges as directed in the Court's opinion embodying its mandate. *Tri-Valley Packing Association v. Federal Trade Commission,* 329 F.2d 694 (9 Cir. 1964.)[2]

In remanding the cause this Court noted:

> "Any judicial review following the entry of Commission's orders resulting from proceedings on remand may be upon the present record and briefs as appropriately supplemented" (329 F.2d 710).[3]

By this petition Petitioner seeks review and reversal of the second Order or decision of the Commission.

The second opinion of the Commission rationalizing the issuance of its second order is reported in C.C.H. *Trade Reg. Rep.* Par. 17,657, p. 22,934 (Transfer Binder 1965-1967). The second dissenting opinion of Commissioner Elman is also reported in the same publication beginning at page 22,942. (See also R. XXIV, 2169-2181). The initial decision of the hearing Examiner adverse to Petitioner, as modified "for clarification and to conform it" to the opinion of the majority was adopted as the decision of the Commission (R. XXIV, 2145). C.C.H., *Trade Reg. Rep.,* supra, p. 22,934. These opinions and the initial decision are part of the record before the Court (R. XXII, 1876-1936; R. XXIV, 2148-2168). The proceedings had in connection with issuance of the prior order, including the majority and dissenting opinions, are reported in *The Matter of Tri-Valley Packing Association,* 60 F.T.C. 1134 (1962). These proceedings and

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2. The parties did not petition the Supreme Court for certiorari within the time allowed by law and accordingly the judgment of the Court and its mandate became final [15 U.S.C. 21(c); 28 U.S.C. 1254].

3. The parties did not apply to the Court for leave to adduce additional evidence [15 U.S.C. 21(c)], but the Court by its mandate did grant the Commission restricted leave to produce additional evidence in connection with the Section 2(d) charges (329 F.2d 710).

opinions are also part of the record (R. IV, 353-378; R. VI, 572-587; 588-591).

The Section 2(a) charges brought against Petitioner, and Petitioner's "meeting of competition" defense (329 F.2d 704), and the issues remanded by the Court in connection therewith center about the selling practices and prices prevalent in "California Street", a well-known and long established food products market whose geographic hub is lower California Street in San Francisco, California. The opinion of this Court contains a brief description of this complicated market which is based entirely on the uncontradicted testimony of Petitioner's assistant sales manager (329 F.2d 694; 696; 704-705).

The operations of this market or "location"[4] were also the subject of an investigation conducted by Subcommittee No. 5 of the Select Committee on Small Business of the House of Representatives. The conclusion drawn from the oral and documentary evidence produced during this inquiry are embodied in a comprehensive report entitled "Small Business Problems in Food Distribution." H.Rep No. 2234, 86 Cong., 2 Sess. This report is mentioned and a part thereof is quoted in the dissenting opinion of Commissioner Elman (R. XXIV, 2169-2171). The Subcommittee's hearings at which the evidence concerning "California Street" was secured were held in San Francisco in October and November 1959, long before the issuance of the Commission's first order and decision. (Hearings before Subcommittee No. 5, Part II, Vols. 1-2). We believe that on this second petition for review this Court may properly look beyond the record and

4. The second majority opinion states, "We conclude on the basis of the record that the California Street market is not a regular exchange, and that it is apparently no more than a location for individual buyers . . . mostly chain stores . . . who enter into their private agreements with the various California canners" (R. XXIV, 2155).

take judicial notice of the proceedings and report of the Subcommittee.[5]

The undisputed facts in the record concerning the California Street market and how prices in that market are determined were summarized in the Court's opinion, as follows:

> "The canners and processors who participate in the California Street market sell most of their products in that market. As of 1957, the prices paid for goods in this market tended to be lower than the prices paid for the same or similar goods by purchasers who were not represented in it.
>
> At the beginning of the pack year, the canners and processors who sell on the California Street market determine from their records the amount of goods sold to various buyers in previous years. The sellers then attempt to obtain 'reservations' from the buyers for a given amount of merchandise to be delivered during the buying season, preferably in excess of that previously purchased.
>
> After the reservations have been entered into, the canners announce their 'opening prices.' These opening prices are usually announced by the large or important factors in the industry comprised of the three or four nationally-advertised brand packers, or independent packers, of a particular commodity. When these price leaders have named their opening prices, the other canners, after examining their costs, will usually follow and name prices which are substantially similar to those of the leaders.
>
> After the opening prices have been announced, they are analyzed by the buyers, *who then set the market price at the level of the lowest prices offered by reliable canners, and proceed to place their orders.* A canner whose prices are in line with the established prices will receive a fair share of shipping instructions. If he does not, or if he receives

5. *Arizona v. California,* 283 U.S. 423, 452-454, 75 L ed 1154, 1164-1165 (1931); *United States v. Darby,* 312 U.S. 100, 109, 85 L. ed 609, 614 (1941); *Greeson v. Imperial Irrigation District,* 59 F.2d 529, 531 (9 Cir. 1932); *Overfield v. Pennroad Corporation,* 146 F.2d 889, 898 (3 Cir. 1944). Moreover, Petitioner requested the Examiner and the Commission officially to notice the proceedings and report of the Subcommittee (R. XIV, 1173-1177).

instructions only for limited quantities, the canner checks with the brokers, buyers or with other canners to determine the reason." (329 Fed. 2d, 694; 705; emphasis added.)

To supply some of the details lacking in this brief description of the market, we call attention to the following finding of Subcommittee No. 5.

> "The vertical integration of the wholesaling and retailing functions in the food distribution industry have reduced greatly the number of parties on the buying side of the market with whom the many thousands of firms engaged in manufacturing and processing food may bargain for disposition of their wares. For example, California, with its hundreds of food processors and packers, produces more than one-half the national output of canned fruits and vegetables. Eighty percent of the California output is purchased by representatives of about 15 firms which have integrated wholesale and retail food distribution functions. The retail food stores, in disposing of the items purchased by these 15 firms, do a total retail food business of more than $15 billion. The representatives of these 15 firms serving as field office purchasing agents are concentrated in offices located on or near California Street, San Francisco, Calif. Therefore, they have become known as California Street buyers. In conducting negotiations with the representatives of canners, each of these 15 California Street buyers deals with several hundreds of sellers, but the representatives of those hundreds of sellers, in disposing of about 80 percent of their total offerings, find themselves able to deal with one or more of the approximately 15 California Street buyers. Thus, in that instance, the vertical integration of wholesaling with food retailing has resulted in heavy concentration on one side of the market, and left the opposite side of the market in a much weaker bargaining position."[6] (Report of Subcommittee No. 5, p. 39.)

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6. For similar findings regarding the operations of this market, the attention of the Court is called to the following portions of the Report of Subcommittee No. 5, pages 9-10; 12; 56-58; 64-65.

We submit that the foregoing amply demonstrates that Petitioner's price reductions or discriminations in this market were made defensively to meet the price of competing sellers in specific transactions pursuant to the proviso appended to Section 2(b) of the Act [15 U.S.C. 13(b)] and that it furnishes overwhelming and uncontradicted proof that not even as a matter of conjecture, Petitioner could have been primarily responsible for the "low" California Street prices (R. XXIV, 2162).

It should also be noted that in its first opinion and decision, the Commission, in effect, condemns the market thus described as "illegal", while in the second decision, it in substance absolves it of all taint of illegality. (Finding 9, R. VI, 576; Majority Opinion, R.VI, 584-585; R. XXIV, 2160-2161).

The section 2(d) charges brought against Petitioner and the issues remanded by the Court in connection therewith concern themselves with advertising allowances granted by Petitioner to a retailer doing business in Portland, Oregon and to a wholesaler engaged in business in Boston, Massachusetts. These transactions are essentially trivial and in no way connected with the California Street market (329, Fed. 2(d) 694, 706-707). Petitioner has consistently admitted during these proceedings that these allowances were not given or made available to its other customers in the localities mentioned. The details of these transactions showing that no violations of 2(d) were involved are hereafter set forth.

We now turn to the issues remanded by the Court for resolution by the Commission. To determine whether in resolving these issues, the Commission went beyond the power vested in it by the Court's remand, we will first examine the opinion of the Court and the record to ascertain the nature of the issues remanded and how these arose. This, of course, will entail an ascertainment of the purpose and scope of the Court's remand. Later, in our specifications of errors and argument, we will show

that the Commission erroneously decided the issues thus remanded.

With respect to the price-discrimination charges this Court remanded two issues for resolution. The first of these may be summarized as follows:

Whether there was a causal connection between Petitioner's lower prices to favored buyers on California Street and probable competitive injury to disfavored customers making their purchases of like goods from elsewhere at higher prices.

This issue originated in Petitioner's contention to this Court that there was no such nexus between its discriminations and probable competitive injury, and that for this reason it had not been established that it had violated Section 2(a). In support of this contention, Petitioner pointed to the fact that its discriminatory sales had been made to favored buyers on California Street at the lower prices that tend to predominate there and asserted that the evidence did not show that there was any obstacle, except perhaps business policy, that prevented the disfavored buyers from purchasing at the lower prices prevalent in this market (Petitioner's Brief, pp. 57-58; 100-102; R.V. 427-428). The Court, however, did not pass on this contention because the Commission had not made the required fact findings and had failed also to enunciate the legal principles applicable thereto. Accordingly, the Court remanded the matter to the Commission *to find the facts and to speak as to the application of the law to the facts found* (329 F.2d 703-704). The command of the Court went no further, and nothing in the opinion of the Court suggests that it considered itself to be dealing with an issue only *partially tried* as to the facts and as to which the Commission had evidence not yet presented, nor could the Court entertain such a notion *because the Commission had at no time made the slightest indication that it desired leave to adduce additional evidence relevant to this question* (15 U.S.C. 21 (c)).

The substance of the second issue remanded in connection with the price discrimination case can be stated as follows:

Whether a seller's lower price is within the proviso of Section 2(b) of the Act only if it is made in response to individual competitive demand, and not if made pursuant to a pricing system, such as that represented by the California Street market.

This issue stems primarily from the fact that Commission counsel resorted to alternate legal theories in attempting to frustrate Petitioner's "meeting of competition" defense based on the proviso apended to Section 2(b) of the Act (15 U.S.C. 13 (b)).

Petitioner in presenting this defense to the Commission on its first appeal relied on *undisputed evidence* that established that its lower prices to favored purchasers were made to *meet* the market prices that buyers were paying for goods on California Street, and contended that this evidence brought its discriminations within the exemption created by the proviso (R. V., 426-433; 454-456). Commission counsel *did not dispute* the factual basis of Petitioner's position, but opposed it instead on the following grounds:

(a) The evidence discloses that Petitioner is *meeting lower prices* on California Street pursuant to a discriminatory and illegal two market *pricing system,* and not in response to the lower prices of other sellers in individual competitive situations. Hence, Petitioner is not meeting competition within the meaning of the proviso (R. V., 485-487).

(b) The evidence shows that Petitioner knew or should have known that the competitors' prices it *met* were *unlawful* in that they could not be *cost justified,* and the exemption afforded by the proviso can be claimed only when the *lower prices met* are lawful. Therefore, Petitioner is not meeting competition within the meaning of the proviso (R. V., 487).

It should be noted at this point that the propositions evolved by Commission counsel, although differing as to legal theory, are

both premised on the then *undisputed fact* that Petitioner was engaged in California Street in *meeting* the equally low prices of competitors.

On the first appeal the Commission rejected Petitioner's defense on the basis of the second of the two propositions postulated by its counsel, and did not expressly deal with the question involved in the first. Expanding somewhat on the scope of the proposition it thus adopted, the Commission ruled, in substance, as follows:

The evidence offered by Petitioner does not indicate that the lower prices it *met* can be excused under any of the exceptions of Section 2(a), or that Petitioner had reason to believe that they could be so justified. Since Petitioner had thus failed to prove that these prices were *lawful,* it has not established on the record that it acted in good faith in *meeting* such prices (Commission's Finding 9, R. VI, 576; Majority Opinion, R. VI, 584-585).

It is apparent that to reach this result, the Commission had *first* to have found that the evidence *was sufficient* to establish that Petitioner was engaged on California Street in *meeting* the lower prices of competitors, whether or not the competition that engendered these prices was competition within the meaning of the proviso.

On the first petition for review Commission counsel not only defended the decisional ground adopted by the Commission, but also urged the Court to reject Petitioner's defense on the alternate ground that Petitioner had reduced its prices pursuant to an illegal pricing system and not in response to the lower prices of other sellers in individual competitive situations (Commission's Brief, pp. 6-9; 40-46; 46-59). Considering the alternatives thus tendered this Court logically concluded that it was not required to pass upon questions concerning the duty of Petitioner to adduce evidence as to the lawfulness of competitive prices or as to its knowledge of such lawfulness if, as contended by Commission counsel, Petitioner had reduced its prices in California Street pur-

suant to an illegal pricing system. Considering also that the Commission had not expressly determined whether this market and its operations constituted such a system, this Court ruled that the Commission should deal first with this threshold question on the law and the facts, and therefore remanded the cause to the Commission. In the language of the Court the threshold issue so remanded is "[whether] a lowered price is within the proviso of section 2(b) *only* if it is made in response to individual competitive demand, and *not* as part of the seller's pricing system, such as that represented by the California Street market" (329 F. 2d 705-706, emphasis added).

Nothing in the opinion of the Court gives the slightest support to the idea that it felt that the evidence in the record was *insufficient* to enable the Commission to resolve the question thus entrusted to it, or that it was remanding the cause to the Commission for the purpose of redetermining whether Petitioner was engaged in meeting *competition* in California Street. Obviously, the issue that was to be resolved was whether the *competition* that Petitioner, in fact, "*faced* in the California Street market is the *kind* of *competition* contemplated by the 'meeting of competition' defense of section 2(b)" (329 F. 2d 706; emphasis added).

With respect to this issue it is well to note that the Commission at no time sought leave from this Court to adduce additional evidence relevant thereto (15 U.S.C. 21 (c)).

In connection with the proceedings originating in the Complaint in Docket 7496, charging unequal treatment in the granting of promotional allowances in violation of Section 2(d) of the Act this Court's remand encompasses only four issues, which may be stated as follows:

1. *Whether in the Boston, Massachusetts area Central Grocers, Inc., a favored wholesaler, and Standard Grocery Company a disfavored wholesaler, purchased Petitioner's goods of like grade and quality at approximately the same period of time* (329 F.2d 709).

2. *Whether Petitioner in the Boston, Massachusetts area engaged in a course of direct dealing with the retailer customers of Central Grocery, Inc.,* (329 F.2d 709).

3. *Whether in the Portland, Oregon area Petitioner engaged in a course of direct dealing with the retailer customers of Hudson House, Inc., a disfavored wholesaler* (329 F.2d 709-710).

4. *Whether in the Portland, Oregon area any of the retail stores of Piggly Wiggly, a subsidiary of Hudson House, Inc, purchased indirectly Petitioner's goods* (329 F.2d 710).

The first of these issues arose as a result of an advertising allowance that Petitioner granted to one of its direct buying customers, Central Grocers, a wholesaler operating in the Boston, Massachusetts area. In 1957 and 1958, Petitioner had an arrangement with Central Grocers by which it ostensibly paid a quarterly sum for an advertising mat in an order guide featuring Central Grocers *private label canned fruits.* The substance of the arrangement, however, was that Petitioner would pay to Central Grocers ten cents per case or $150 for the *first* 1500 cases of *canned fruits* purchased by it, and an additional ten cents per case for each case of goods thereafter purchased during the year. These payments were made in consideration of supplying Central Grocers' private label *canned fruits,* and in "return for that business and to move that volume of merchandise" (329 F.2d 707). Presumably by reason of this arrangement, Petitioner became during the years in question Central Grocers' supplier of California canned fruits (R. XI 955; 960). The record shows that during the first six months of *1957,* Central Grocers purchased 1314 cases of *canned fruits* from Petitioner (Respondent's Ex. 9(d)). The record is entirely silent as to the *grade and quality of the* products *outside* the canned fruits line, *if any,* that Central Grocers may have purchased from Petitioner during 1957 and 1958. Other direct customers of Petitioner in this area at these times were two retail chains and a wholesaler, none of whom

were offered or granted advertising allowance by Petitioner (329 F.2d 706-707).

Petitioner contended that it had not violated Section 2(d) because there was no substantial evidence to support a finding that its favored and disfavored customers were *actually* competing with each other in the sale and distribution of its goods of *like grade and quality.* In this connection, Petitioner contended that actual competition had not been proven because its products had not been traced to the shelves of any two of its customers whose outlets were in such geographical proximity as to indicate that they were in competition with each other (329 F.2d 708).

The Court rejected this contention and said, in effect, that it is not necessary so to trace the seller's goods of *like grade and quality;* that it is *sufficient to prove* that one customer has outlets in such geographical proximity to those of the other as to establish that the two customers are in *general* competition, *"and* that the two customers purchased goods of *the same grade and quality"* from the seller within approximately the same period of time, and that upon proof of these basic elements there can be *inferred* that the two customers are in *actual* competition with each other in the sale of the seller's goods. Explaining its ruling, the Court stated that the objectives of Section 2(d), i.e., that sellers deal fairly with their competing customers, "cannot be achieved unless sellers who propose to make such an allowance *assume* that all direct customers who are in *functional* competition in the same geographical area, *and who buy the seller's products of like grade and quality* within approximately the same period of time, are in *actual* competition with each other in the distribution of *these products"* (329 F.2d 708-709; emphasis added).

Having thus laid down the law of the case the Court went on to note that the record showed that Standard Grocery Company, a wholesaler, was the only direct customer of Petitioner in the area that competed with Central Grocers at the same *func-*

tional level, but that nothing in the record called to its attention indicated that these wholesalers had purchased goods from Petitioner during approximately the same period of time, and that for this reason it was not established that these customers were in competition. Adverting, however, to the fact that the record suggested the probability that such purchases could have occurred, the Court said, "If there is presently evidence in the record which would show such proximity as to the time of purchases by Central Grocers and Standard Grocery, or if evidence *is later adduced* showing this, then as to these two customers of Tri-Valley *actual* competition would be established and, as to them a section 2(d) violation would be established" (329 F.2d 709; emphasis added). Accordingly, the Court remanded the matter to the Commission to enable it to call attention to such evidence in the record *or to adduce the same.* Neverthless, the Court did not thereby relieve the Commission from proving one of the essential elements of the offense twice expressly mentioned in its opinion, i.e., that the generally competing customers *purchased goods of the same grade and quality from the seller.* As to this, it is well to note that on or about April 16, 1957, Standard Grocery purchased 150 cases of *tomato paste* from Petitioner packed under Petitioner's "Corina" label, and that this fill-in, one time purchase is probably the only purchase that Standard Grocery ever made from Petitioner (Com. Ex. 45; R. XI, 975; 978-979; 982-983).

The second and third issues above listed arose because of a ruling by the Court to the following effect:

(a) Section 2(d) is not violated by reason of Petitioner's discrimination in favor of Central Grocers and against the two direct buying retail chains in the Boston area, *unless* the evidence shows that Petitioner engaged in a course of *direct* dealing with the retailer-customers of Central Grocers operating in that area who inferentially were in competition with the outlets of the disfavored chains.

(b) Section 2(d) is not violated by reason of Petitioner's discriminations in favor of Fred Meyers, Inc., a retailer operating in the Portland, Oregon area and against Hudson House, Inc., a wholesaler also operating in the Portland area, *unless* the evidence shows that Petitioner engaged in a course of *direct* dealing with the retailer customers of Hudson House operating in that area who inferentially were in competition with the outlets of the favored retailer.

Applying these principles to the record the Court determined that the evidence did not show that Petitioner had engaged in such a course of direct dealing, and hence remanded the cause to the Commission to enable it to remedy the defects in its proof (329 F.2d 709-710).

The fourth and last issue emerged when Commission counsel asserted that Hudson House, Inc., a wholesaler, was in fact in the retail business, because its wholly owned corporate subsidiary, Piggly-Wiggly, was a retailer (Commission's Brief, p. 11). This assertion caused the Court to consider whether the advertising allowance accorded by Petitioner to Fred Meyer, a retailer, and not made available on proportionately equal terms to Hudson House violated Section 2(d), but determined that the evidence was insufficient to establish such a violation (329 F.2d 709-710, footnote 22). In so doing the Court stated the following:

> "No Section 2(d) violation was shown as to the retail operations of Hudson House, if there was such an operation, because it was not shown that any Tri-Valley goods were purchased indirectly by those Piggly-Wiggly outlets during the period in question. This could only have been shown by tracing Tri-Valley to the shelves of those stores by means of the best evidence available" (329 F.2d 710).

Having thus admonished the Commission the Court ordered a remand on this issue to afford the Commission the opportunity to supply the deficiencies in its proof.

The purpose and scope of the remand on the allowance discrimination charges was plainly stated by the Court in the paragraph immediately following its extensive discussion of the legal and factual questions presented. This statement is as follows:

> ". . . we think it appropriate to afford the Commission, on such remand, the opportunity of calling attention to evidence presently in the record, or of producing additional evidence, which will overcome the present seeming, or actual, lack of factual support for the section 2(d) charges *as discussed above*"[7] (329 F.2d 710).

It is clear from the foregoing that the Court did not authorize an unlimited trial *de novo* of the Section 2(d) charges.

The Commission erroneously decided most of the foregoing remand issues entrusted to it adversely to Petitioner. In so doing, the Commission also committed other errors, and the details of these are hereinafter set forth.

ASSIGNMENTS AND SPECIFICATIONS OF ERROR

1. The Commission erred as a matter of law in adducing and considering additional evidence with respect to the two issues remanded in connection with the Section 2(a) charges.

2. The Commission erred as a matter of fact and law in holding that there was a causal connection between Petitioner's discriminations and probably competitive injury to disfavored buyers.

3. The Commission erred as a matter of fact and law when it refused to resolve the second remand issue in accordance with the Court's mandate and relitigated the issue whether Petitioner had actually met the lower prices of competitors.

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7. All emphasis added to quoted material is supplied by us, unless otherwise indicated.

4. The Commission erred as a matter of law when it made new findings as to actual direct and indirect competition between Petitioner's favored and disfavored customers.

5. The Commission erred as a matter of fact and law in holding that the payments to Fred Meyer, Inc., and Central Grocers, Inc. violated Section 2(d) of the Act.

6. The Commission erred in failing to frame its order in terms which bear a reasonable relationship to the practices alleged to be unlawful.

ARGUMENT

1. The Commission Received Further Evidence on the Two Price Discrimination Issues Remanded. The Commission Was Without Power to Receive or Consider Such Evidence, and Accordingly the Same Should Be Disregarded.

On November 23, 1964, a prehearing conference was held before the Commission's Examiner (R. XIX, 1575). At the outset, the Examiner declared that hearings in the case, "*pursuant to instructions of the Court of Appeals* had been delayed so that counsel would have the opportunity of making further investigation and attaining further evidence which the Court of Appeals seemed to contemplate in the event the record, as it stood, was insufficient to resolve the issues raised by the Court of Appeals in accordance with the remand" (R. XIX, 1576).

Having thus summarized his version of the purpose of the remand, the Examiner went on to state, in effect, that in his view the record, as it stood, was insufficient to resolve the issues remanded (R. XIX, 1578).

In connection with the first issue that arose from the price discrimination charge, i.e., whether there was a causal connection between Petitioner's discriminations and alleged injury to competition, the Examiner asserted that in his opinion the evidence in the record was insufficient for the resolution of this issue, and ruled that Commission's counsel had the burden of producing the

additional evidence required to cure this defect (R. XIX, 1581; 1584).[8] Clearly at this point, it was evident that the Commission had failed to establish that Petitioner's discriminations were the proximate cause of competitive injury, and absent leave to adduce additional evidence, the Examiner should have dismissed the 2(a) charges.

As to the question of law involved in the second issue which arose from the price discrimination charge, i.e., whether a lower discriminatory price is protected by the "meeting of competition" proviso only if it is made in response to an individual competitive demand, the Examiner declared that in his view the evidence in the record was also insufficient for the resolution of the issue, and decided that Petitioner's counsel had the burden of adducing the additional evidence necessary to remedy this flaw (R. XIX, 1581).

The record indicates that the Examiner was of two minds regarding the sufficiency of the evidence proffered by Petitioner regarding the second issue at the hearings held prior to remand. He declared first, as has been mentioned above, that Petitioner's evidence was inadequate, but then he went on to say that at the hearings to be thereafter held, he would be willing to receive evidence from Commission's counsel by way of *rebuttal* (R. XIX, 1581-1583). In this connection, it should be observed that Commission's counsel was given ample opportunity to adduce *rebuttal* evidence when the case was first submitted to the Examiner, but failed to avail himself thereof (R. XVIII, 1558), and that at no time thereafter did he solicit leave from the court for this purpose.

In any event, Commission counsel subsequent to the pre-hearing conference adduced oral and documentary evidence with respect to the two remand issues involved in the price discrimination issues.

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8. The ruling that Commission's counsel had the burden of proof on this issue was correct. *Alexander v. The Texas Company,* 165 F.Supp. 53, 58 (D.C.W.D. La. 1958); *Youngson v. Tidewater Oil Company,* 166 F. Supp. 146, 147 (D.C. Or. 1958).

Some of this evidence, not all, was received over the objection of Petitioner. Petitioner expressly objected to the further cross examination of its only witness four years after he had first testified. This objection was based on the ground that the case had not been remanded for the purpose of further cross examining this witness (R. XXVII, 2460-2461).

The oral and documentary evidence thus received which was considered by the Commission in arriving at its second decision is the following:

(a) Testimony of Walter Tewes (R. XXV, 2208-2230);

(b) Testimony of Samuel Arshan (R. XXV, 2230-2253);

(c) Testimony of Walter Rohrs (R. XXV, 2254-2269);

(d) Testimony of Russell Snyder (R. XXVII, 2418-2478);

(e) Commission Exhibits Nos. 223, 225.

Messrs. Tewes, Arshan and Rohrs were representatives of unfavored wholesalers doing business in Manhattan and New Jersey. The tenor of the testimony of Tewes and Arshan was, in part, that they had never heard of the California Street market or of California Street prices. The tendency of the testimony of the third witness, Mr. Rohrs, was that he had heard rumors about California Street prices and that his recollection did not go beyond that point. On the basis of this evidence, the Commission concluded, in effect, that no prospective purchaser, including all of Petitioner's disfavored purchasers, could have informed themselves "as to the 'general price level' in California" (R. XXIV, 2155).

Mr. Snyder testified, in substance, on cross-examination, that anyone could buy merchandise on the general market levels as cheaply as in California Street anywhere in the country, and that information regarding prices quoted on California Street could be obtained through various sources. The Commission compared this testimony with some given by Mr. Snyder prior to remand and

concluded, as did the Examiner, that there was no California Street market price (R. XXIV, 2151-2155). Commission Exhibits Nos. 223 and 225 were used to establish to the Commission's satisfaction that the prices quoted by Petitioner to two large chains were not available to the disfavored purchasers (R. XXIV, 2156-2157).

It has been noted before that neither of the parties requested leave from this Court to adduce additional evidence concerning the price discrimination issues as required by the provisions of 15 U.S.C. 21(c). This being so, both parties were precluded from producing any such evidence. Moreover, as has been pointed out previously, there is nothing in the opinion of the Court, incorporated by reference in its mandate,[9] that expressly or by fair implication authorizes either party to submit such evidence for consideration either in first instance or on review. Under such circumstances, the rule must be applied that the Commission, as an inferior tribunal, was without power, i.e., jurisdiction, to receive this evidence even though Petitioner failed to object for the most part to its introduction. This is the teaching of *Zdanok v. Glidden Co.,* 327 Fed. 2(d) 944, 949-950 (2 Cir. 1964) cert. denied 377 U.S. 934, 12 L. Ed. 298 (1964).

This being a matter of jurisdiction and not of procedure, the price discrimination issues have returned to this Court on review in virtually the same evidenciary posture as at the time of its first decision (*Zdanok v. Glidden Co.,* supra, concurring opinion of Chief Judge Lumbard, p. 957).

Accordingly, no inferences favorable to the Commission's findings and decision may be drawn from the evidence thus unlawfully received and the whole thereof should be disregarded.

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9. *Federal Home Loan Bank of San Francisco v. Hall,* 225 Fed. 2(d) 349, 380-381 (9 Cir. 1955).

2. There Is No Causal Connection Between Petitioner's Lower Prices to Favored Buyers on California Street and Probable Competitive Injury to Disfavored Customers.

In deciding the first remand issue against Petitioner, the Commission ostensibly concluded that there was a causal link between Petitioner's discriminations in the California Street market and probable injury to competition because the "lower prices quoted by respondent to certain favored chains were not in fact *available*[10] to the unfavored customers" (R. XXIV, 2158).

The Commission's opinion reveals, however, that the causal link between any probable injury to competition was the prevailing method of doing business in California Street, and that any such injury would occur whether or not Petitioner sold any goods in that market. In this connection it should be borne in mind that the Commission has categorically stated that the record does not show that Petitioner and its competitors "were selling pursuant to a system of the type condemned" in the cases cited by its counsel (R. XXIV, 2160).

The inferences *drawn by the Commission* from the record and probably from the findings of Subcommittee No. 5 lead inevitably to the conclusion that it was the mode of doing business in this market and not Petitioner's conduct that was responsible for any competitive disadvantage visited upon the disfavored buyers.

The Commission first inferred that the "California Street market is not a regular exchange and * * * * it apparently is no more than a location for *individual* buyers—mostly chain stores—*who enter into their own private agreements with various California canners*" (R. XXIV, 2155). Granting the validity of this inference it is noteworthy that the Commission has not condemned as illicit the method of doing business in this market even though the prices set by individual negotiations between many sellers and buyers are not open and notorious.

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10. The Commission's view is that a price is *available* only if it is voluntarily and affirmatively quoted or offered by the seller to the prospective purchaser (R. XXIV, 2156 and footnote 2; 2158).

Second, it inferred that Petitioner's "lower prices were tailored to the requirements or demands of the favored chains" (R. XXIV, 2157). This inference was drawn, as the opinion of the Commission indicates, from testimony describing the long established method followed by Libby McNeill & Libby (one of several canners offering its wares on California Street) in bargaining with Safeway for the sale of its products, and it is remarkable that the Commission did not pronounce unlawful Libby's practice of meeting or *beating* the prices offered Safeway by competitors (R. XV, 1316-1319).

The practices thus described, according to Commission doctrine, tend to result in injurious discrimination, and hence it is significant that the Commission did not find that the prices set on California Street by such individual and private agreements were voluntarily quoted or offered by Petitioner's competitors to customers located elsewhere. The reason for this may be that these prices were solely the result of the strong economic pressure that only the large chains could exert in bargaining with the various California canners, and accordingly it might not be rational to find that these prices were made available to other buyers. While we have merely suggested that this might be the reason that no such finding was made, the Commission's further inferences most clearly indicate that it was. These further inferences are to the effect that the lower prices so obtained were "clearly a result of the buying power of the chains, and it would be wholly unrealistic to hold that such prices were available to smaller purchasers," because individual negotiations with the various canners would not be practical for the smaller independents and many wholesalers as they "are not equipped and do not have the resources to bargain on the same footing as the large chains"[11] (R. XXIV, 2158). In the face of

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11. The invalidity of this proposition becomes apparent when it is considered that there is *no evidence* in the record showing that any disfavored buyer attempted to obtain prices lower than those originally quoted and was refused.

the circumstances so categorically stated by the Commission it would be entirely unrealistic for the Commission tacitly to presume that all or a majority of the canners selling on California Street, *except Petitioner,* could, would or did make available to other purchasers the lower prices agreed upon in individual negotiations with the large chains.[12] Therefore, in the absence of the finding to which we have adverted and of evidence that might support it, it follows that the direct and proximate cause of probable injury to competition was the system of doing business on California Street and not Petitioner's discriminations since the disfavored customers would be in any event confronted with the lower prices accorded the chains by the other canners with or without petitioner's price differentials. See Rowe, Price Discrimination Under the Robinson-Patman Act (1962), Sec. 8.5, p. 194. In this connection it should be remembered that the Commission did not find that Petitioner was primarily responsible *"for the low 'California Street' prices,"* and merely *conjectured* that it might have been (R. XXIV, 2162). Accordingly, Petitioner's prices contributed nothing to a competitive situation in the Street that the Commission has now found to be wholly untainted by illegality (R. XXIV, 2160). See Rowe, supra, Sec. 8.5, p. 194, footnote 92.

In disposing of this first issue, the Commission also committed a grave error. It ruled as a matter of law that the nonfavored purchasers are not required to keep abreast of market quotations or seek out by bargaining the lowest prices and, further, that sellers are required by virtue of the broad design and purpose of section 2 (a) voluntarily to offer (make available) to apathetic or uninformed buyers the same prices secured through haggling and bargaining by energetic and knowledgeable purchasers. In so doing the Commission relied on concepts of equal availability

12. Moreover, in its prior decision the Commission found as a *fact* that Petitioner "knew, or should have known, the lower prices of its competitors were discriminatory . . ." (R. VI, 576).

germane to section 2 (d) and (e) which apply even in the absence of demonstrable competitive injury, and said in attempting to justify such action that to "construe the Act so as to require bargaining as a basis of price equality would be to deny the protection of the Clayton Act to the small customers." (R. XXIV, 2158). The proposition thus stated by the Commission rests entirely on the false assumption that a large number of purchasers "are not equipped and they do not have the resources to bargain on the same footing as the large chains" (R. XXIV, 2158). This is a false assumption that cannot achieve the dignity of substantial evidence because there is absolutely nothing in the record of this cause that shows that any disfavored buyer ever attempted to obtain by bargaining or any other method prices lower than those originally quoted. Moreover, there is nothing in common experience that indicates that bargaining by smaller purchasers would be futile.

The error thus committed is further made evident by the legally established fact that the antitrust laws, including the Act, definitely permit sturdy bargaining between buyers and sellers. *Automatic Canteen Co. v. Federal Trade Commission,* 341 U.S. 61, 73-74, 94 L ed. 1454, 1463 (1953); *Forster Mfg. Co. v. Federal Trade Commission,* 335 F 2d 47, 55-56 (5 Cir. 1964). The reason that scope for such bargaining is allowed by these laws is that it is a necessary concomitant of the trading done in imperfect markets. The nature and incidents of this economic phenomenon are well illustrated by the following statement:

> "Second, under conditions of imperfect markets, haggling by the buyers for special price concessions or deals constitutes an integral part of the competitive process. Because of time lag in the spread of information about prices charged or relative inertia of some buyers in seeking out possibilities of special deals, or for other reasons such as seller's expectation of future business, certain buyers may be more effective than others in obtaining price reductions. Imposing severe

limitations on the businessman's freedom to obtain such deals, because of the possibility that a particular competitor of his may be harmed as a result of price discrimination, may lead to curtailment of price competition. 'The effort to buy as cheaply as possible is an essential feature of competition; and except in a perfect market it is not to be expected that all buyers will obtain their supplies at the same price,' states the former Chief Economist of the Federal Trade Commission. (Corwin Edwards, Maintaining Competition, p. 163". Burns, A Study Of The Antitrust Laws (1958), pp. 139-140.

The fallacies inherent in this ruling of the Commission are also further exposed by the testimony adduced at the hearings held before Subcommittee No. 5, which discloses that prices current in California Street are well known in other markets throughout the country and do not always originate in the street. (Testimony of Mr. House, hearings before Subcommittee No. 5, Part II, Vol. 1, p. 744; testimony of Mr. Corbus, id., pp. 608-609.)

In view of the foregoing, it is submitted that there is no substantial evidence or sound law to support the finding of the Commission that Petitioner's discrimination were the proximate cause of probable injury to competition.

3. The Commission did not resolve the second remand issue in accordance with the Court's mandate, and while disregarding the mandate it relitigated an issue which had been originally decided in Petitioner's favor.

The Commission did *not* resolve the second remand issue of the price discrimination case as framed by this Court. It avoided resolving this issue by a misconception of the Court's instructions and thereby reintroduced into the litigation questions which it had settled by its first decision in Petitioner's favor. The Court's direction was that the Commission resolve the threshold question of *law* whether a lowered price is within the proviso of Section 2(b) *"only if it is made in response to an individual competitive demand,* and not as part of the Seller's pricing system, *such as that*

represented by the California Street Market" (329 F. 2d 706). The Commission, in substance, translated this direction to mean that the Court had instructed it to determine (1) whether the *evidence* establishes that either Petitioner or its competitors on California Street were selling pursuant to a pricing system or an illegal pricing system; (2) whether Petitioner as a matter of law could reduce its prices to meet the lower prices of its competitors even if these were using a formal pricing system, and (3) whether Petitioner adduced evidence sufficient to show that as to each discrimination Petitioner, as a reasonable and prudent person, *exercised reasonable diligence* in verifying the existence of a lower price of a competitor, and thereby established that its lower prices were made in response to individual competitive demand (R. XXIV, 2160-2161).

The Commission resolved the first two branches of the remand issue it had thus contrived for itself, in substance, as follows:

The record does not support a finding that either Petitioner or its competitors were selling pursuant to a pricing system or an illegal pricing system, and, aside from the question whether Petitioner "was meeting *unlawful prices* or had reason to believe it was doing so," Petitioner "could as a matter of law reduce its prices in *individual transactions* to meet the lower prices of its competitors . . . *even if the latter were using a formal pricing system"* (R. XXIV, 2160).

This ruling enabled the Commission to avoid the necessity of dealing with the legality of the California Street market on an industry-wide scale and established the basis for issuing a cease and desist order against Petitioner *alone.*

The Commission found it more difficult to find an answer to the third branch of its issue for the reason that the question whether Petitioner exercised *diligence* in meeting prices, regardless of their *legality,* had been, in effect, finally decided in Petitioner's favor by the Commission during the first round of litigation, and on principles akin to *res judicata* could not again be

litigated. *United States v. Utah Construction and Mining Company,* 384 U.S. 394, 420-422; 16 L ed 2d 642, 660-661 (1966) This can be shown by examining the factual and legal grounds on which the Commission based its rejection of Petitioner's 2(b) defense in the first instance. These may be summarized as follows: The buyers represented on the California Street market *"have usually paid less* for the *packers'* products than buyers that purchase in other markets." Although the *opening* prices are ordinarily announced by the packers in this market, almost invariably the "market price" is established below the range of *opening prices,* and "goods are not sold in appreciable volume unless the *prices* are satisfactory to the buyers." Notwithstanding the Petitioner *"was aware of all these facts* and therefore knew, or should have known, that the *lower prices* of its competitors were *discriminatory,* it did not adduce evidence to show that it had reason to believe that such *prices* were *lawful* (Commission's Finding 9, R. VI, 576; Majority Opinion R. VI, 584-585). The facts thus epitomized were drawn by the Commission from testimony proffered by Petitioner and therefore there is implicit in the *awareness* so attributed by the Commission to Petitioner the notion that it had exercised due care in ascertaining conditions in the market including competitors prices, and logically the Commission need not and could not reach the question of the lawfulness of competitors prices without first deciding the issue of diligence in favor of Petitioner. Certainly, the issue of lawful prices became "inmaterial" if the Commission had found that Petitioner had been negligent. Moreover, it is not possible to assume that the Commission overlooked the issue whether Petitioner had been negligent because Petitioner pointedly brought it to his attention when it stated in its brief on appeal that the *record* disclosed "that in all sales made in this market to its alleged favored buyers respondent zealously scrutinized the prices of its competitors before reducing the prices to meet the market price (i.e., the individual prices of one or more competitors)" (R. V. 432-433). This statement was repeated in

Petitioner's brief on the first petition for review, and there Petitioner asserted, "The Commission has never questioned the foregoing statement, and, accordingly, the facts therein summarized are uncontradicted and unchallenged" (Petitioner's Brief, pp. 58-59). The Commission and its counsel did not take exception to these positive and unambiguous declarations at any stage of the proceedings and the reason for this must be that they were convinced that this relevant and essential issue had been finally decided on the basis of the *record* in Petitioner's favor. (Commission's Brief, p. 45, footnote 21). Finally, if the Commission had felt that there were any infirmities in Petitioner's evidence and in the conclusions drawn therefrom by the Court, the Commission had ample time following the judgment of the Court to apply for a rehearing wherein any such deficiencies could have been called to the attention of the Court.

Confronted with these circumstances the Commission was compelled to assert that it had made a substantive error in giving any consideration whatsoever to Petitioner's evidence, and this it did when it said "there is *nothing* in the record to show that respondent's lower discriminatory prices were made in self defense in response to competitors' prices or offers" (R. XXIV, 2162).

To justify this position in view of its prior fact findings the Commission went on to fashion an inflexible rule, seemingly based on the primitive testimonial views of the ecclesiastical courts, to the effect that a 2(b) defense may not be accorded any consideration unless the seller adduces certain *indispensable corroborating evidence*. IV Wigmore, Evidence, Sec. 2032, pp. 291-293 (2 Ed. 1923). The Commission's statement of the rule thus evolved is as follows:

> "*General testimony* to the effect that price discriminations were made to 'meet competition' *without* documentation or specific evidence, *is never sufficient to support a finding* that a lower price was 'made in good faith to meet an equally low price of competitor" (R. XXIV, 2163).

Obviously, the application of this fixed rule of thumb deprives the Commission of discretion in the estimation of the worth and weight of evidence, but in this case it serves purposes which the Commission deems desirable. First, it enables the Commission in its second decision to reject Petitioner's general testimony *in toto* because it is not synthesized with documentation or specific evidence, thus leaving Petitioner's case a *blank* so far as evidence upon its 2(b) defense is concerned. IV Wigmore Evidence, Section 2030, pp. 289-290 (2 Ed. 1923). Second, on this petition for review it permits the Commission to assert that it grossly erred when it found in the first instance that Petitioner exercised due care and that this finding is not binding upon it because it is based on evidence which as a matter of law it was bound not to consider. Third, it enables the Commission on review to contend that the Court remanded the cause to afford it the opportunity to correct this error by reexamining Petitioner's evidence to determine whether it meets the basic requirement of the rule thus enunciated in its second decision. With respect to all this it should be noted that the Commission cautiously pretends that this rule is sanctioned by the Supreme Court's decision in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 89 L. Ed. 1938 (1949) (R. XXIV, 2163). Cf. *Forster Mfg. Co. v. Federal Trade Commission*, 335 F.2d 47, 55-56, supra.

In any event the Commission, applying this principle, rejected the testimony of Petitioner's entirely competent and credible witness without any estimation of its worth and held that Petitioner's evidence was not sufficient to show that Petitioner had exercised diligence in verifying the existence of a lower price of a competitor (R. XXIV, 2163). It can be seen therefore that by this device the Commission evaded the duty of resolving the issue of law remanded by the Court, and relitigated a fact question which it had therefore decided in Petitioner's favor.

The Commission's disregard of the Court's mandate on this issue justly merits the following comment which appears in the dissenting opinion of Commissioner Elman:

> "The Commission's present disposition of the case does more than make the remand from the Court of Appeals an exercise in futility" (R. XXIV, 2178-2179).

At the time this case was decided by the Commission Section 6(a) of the Administrative Procedure Act provided that, "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it . . ." [5 U.S.C. 1005(a)]. The relitigation of the issue whether the petitioner had met competition in California Street under the circumstances herein exhibited constitutes a grave breach of the command of this statute. Accordingly, this Court should not only hold that the Commission is estopped from relitigating this issue, but should also set aside the 2(a) charges without any further remand for any purpose to the Commission.

4. The Commission Made New Findings Regarding the 2(a) Charges Without Authority of This Court.

Having thus disposed of petitioners "meeting of competition" defense, the Commission went on to sanction new and numerous findings made by the Examiner with respect to actual direct and indirect competition between the favored and disfavored buyers of petitioner's goods in connection with the price discrimination charges (R. XXIV, 2167-2168). This the Commission did notwithstanding petitioner demonstrated that these findings were inconsistent with the Commission's prior findings approved by this Court, and that this Court had *not* in remanding the cause directed the making of such new and unnecessary additional findings (R. XXII, 1992-1995). Indeed, the opinion of the Court clearly shows that it ruled that no such additional findings were required to sustain the Commission's cease and desist order relating to the Section 2(a) charges (329 F.2d 702). Consequently, these new findings should be vacated thereby relieving the Court of the

fruitless and *delaying* task of reviewing an extensive record for a *second* time to determine whether there is evidentiary support therefor. As to this it should be observed that the relitigation of the issue once settled by a reviewing court hinders the expeditious disposition of causes. *Morand Bros. Beverage Co. v. National Labor Relations Board*, 204 F.2d 529, 532 (7 CIR. 1953). Among the new and unnecessary findings sanctioned by the Commission is one whereby the Examiner found that the petitioner had discriminated in price against Hudson House by reason of the allowance it gave Meyer in connection with the coupon program (R. XXII, 1884; XXIV, 2168). The Commission in approving this finding entirely ignored that the coupon redemption feature of this allowance was presented by its counsel to this Court as an integral part of a genuine advertising and promotional allowance granted in consideration of services actually rendered, cognizable therefore *only* under Section 2(d), and that this Court was thereby persuaded so to deal with it. (Commission's Brief, pp. 18-21; 59-60; 62; 329 F.2d 706-708). It is well to bear in mind that by this action the Court, in effect, upheld the Commission's findings that the allowance was given in consideration or as compensation for services furnished in connection with the sale or offering for sale of products sold by Petitioner, and not to facilitate the original sale as contended by Petitioner (329 F.2d 708). It is also well to recall that Commission counsel have never contended in this Court *in this case* that the relationship betwen the free goods given Meyer upon the redemption of the coupons was so disproportionate as to render this component of the promotion a price discrimination cognizable under Section 2(a). Cf. *Fred Meyer Inc. v. Federal Trade Commission*, 359 F.2d 351, 361-362 (9 CIR. 1966). Accordingly, the decision of this Court on this point is the law of the case and the Commission was without authority to make a finding contrary thereto. *Morand Bros. Beverage Co. v. National Labor Relations Board*, 204 F.2d 529, 532. supra.

5. There Is No Factual or Legal Support for the Commission's Findings That Petitioner Violated Section 2(d).

The Commission approved in their entirety the Examiner's findings to the effect that Petitioner had violated Section 2(d) of the Act (R. XXIV, 2164, 2167). These findings and the errors inherent in them are hereinafter discussed.

The Examiner decided the first issue—the one involving the advertising allowance to Central Grocery in Boston—against Petitioner for the reason that Standard Grocery and Central Grocery purchased goods from it, at approximately the same period of time. In doing this, the Examiner deemed it irrelevant that the goods purchased by Standard Grocery were not of the same grade and quality as those purchased by Central Grocers because according to his conception of the arrangement between Petitioner and Central Grocers the allowance was given to "promote" Petitioner's "*general line* of products" in Central Grocers' order guide (R. XXII, 1902-1903). This is, of course, contrary to the evidence which shows that the payments were made on the number of cases of canned fruits purchased, and conflicts with the law of the case (329 F.2d 707; 708-709).

While so resolving this issue, the Examiner also found that Petitioner had discriminated against another wholesaler in the area, although the goods purchased by this wholesaler were not of the same grade and quality as those purchased by Central Grocers (R. XXII, 1901-1902). This finding has the same factual and legal infirmities as the one made in connection with Standard Grocery. Moreover, the mandate of the Court did not authorize the Commission to adduce further evidence regarding other wholesalers who were not accorded an allowance. *Zdanok v. Glidden Co.*, 327 Fed. 944, supra.

Finally, the Examiner likewise found that Petitioner had discriminated against Safeway Stores, Inc., in Portland, Oregon, because it had not made available to this chain the allowance given to Fred Meyer to promote the sale of its peaches although the

record plainly shows that these customers did not buy Petitioner's promoted products at approximately the same time and despite that there is *no evidence* showing that market conditions had remained essentially the same during the period that elapsed between Safeway's *last* purchase made on April 1, 1957, and Fred Meyer's promotional campaign which began on September 25 of that year (R. XXII, 1889-1890; Com. Exhs. 10; 33). Cf. *Fred Meyer Inc. v. Federal Trade Commission,* 359 F.2d 351, 357, supra. In addition, there is nothing in the mandate of the Court that authorized the Commission to produce additional evidence with respect to another retailer who was not accorded an allowance. *Zdanok v. Glidden Co.,* supra.

In view of the foregoing, it is submitted that the Commission's order regarding the Section 2(d) charges should be set aside. No evidence was adduced with respect to the other issues remanded in connection with the Section 2(d), and hence no findings were made.

6. The Broad Breadth and Scope of the Commission's Order Exceeds the Legitimate Needs of the Case, and, Is, Therefore, Erroneous.

With respect to the breadth and scope of the Commission's order, petitioner relies on the contentions made in his first brief herein (Brief for Petitioner in Docket 18125, pp. 165-166).

CONCLUSION

For all of the reasons herein set forth above. Petitioner prays this Honorable Court to set aside the order of the Commission.

Dated, San Francisco, California, May 23, 1968.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief I examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those Rules.

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